92-761

Supreme Court, U.S.
FILED
SEP 28 1992
OFFICE OF THE CLERK

CASE NO. _____

SUPREME COURT OF THE UNITED STATES

October, 1992, Term

GEORGE W. LANKFORD,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

ROBERT W. CHESTNEY, ESQ.
Counsel for Petitioner
6325 Amherst Court
Suite 300
Norcross, Georgia 30092
404 263-0015

GREGORY E. STUHLER, ESQ.
Of Counsel

QUESTIONS PRESENTED FOR REVIEW

Whether the use at trial of a defendant's refusal to submit to a state-administered breath test violates the Fifth and Fourteenth Amendments where, as distinguished from South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, the defendant did not receive Miranda warnings.

Whether the use at trial of a defendant's post-arrest *silence* in response to a request for a state-administered breath test violates the Fifth and Fourteenth Amendments.

TABLE OF CONTENTS

QUESTIONS RESENTED FOR REVIEW 1

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 3

REPORTS OF OPINIONS 4

GROUNDS FOR JURISDICTION 5

STATEMENT OF THE CASE 7

REASONS FOR ALLOWANCE OF THE WRIT . . 9

APPENDIX

TABLE OF AUTHORITIES

	Page
Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)	10
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	1,7,9,10
South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)	9,10
U.S. Constitution, Amendment V	6,8,9,10
U.S. Constitution, Amendment XIV	6,8,9,10
Wainwright v. Greenfield, 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 91 (1976)	10

REPORTS OF OPINIONS

The only opinion delivered in this case is reported at Lankford v. State, 204 Ga. App. 405, 419 S.E.2d 498 (1992).

GROUNDS FOR JURISDICTION

On May 13, 1992, the Georgia Court of Appeals entered the judgment sought to be reviewed. Petitioner's motion for reconsideration was denied on June 2, 1992.

Petitioner's application for a writ of certiorari was denied by the Georgia Supreme Court on July 16, 1992, and a motion for reconsideration was denied on July 30, 1992.

Jurisdiction to review the judgment in question is conferred on the Supreme Court of the United States by 28 U.S.C.A. § 1257(a), which provides that such a decision may be reviewed by the Supreme Court by writ of certiorari where any right is specially set up or claimed under the Constitution.

The constitutional provisions involved in the case are as follows:

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .
>
> U.S. Constitution, Amendment V

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .
>
> U.S. Constitution, Amendment XIV

STATEMENT OF THE CASE

Petitioner was arrested for D.U.I. and other traffic offenses. He was read the Georgia implied consent warnings, but was not given a Miranda warning, and was then requested to submit to a state-administered breath test. Petitioner stated that he wished to take a blood test, but remained silent when repeatedly requested to submit to the breath test. The state was permitted, over proper objection, to use Petitioner's silence as a "refusal" to take the breath test, to introduce evidence of the same, and to argue that his "refusal" carried an inference of guilt.

Petitioner filed a pre-trial motion to suppress evidence of his silence/ refusal based upon the failure to give Miranda warnings prior to being asked to

submit to the breath test, a violation of the Fifth and Fourteenth Amendments (App. xviii), which was denied (App. xix). Petitioner again raised this federal issue in his motion for new trial (App. xx), which was denied by the trial court. (App. xxi).

Petitioner appealed his conviction and denial of his motion for new trial to the Georgia Court of Appeals (App. xxiii), again raising the federal constitutional issues. The Georgia Court of Appeals affirmed the trial court (App. i), and denied Petitioner's motion for reconsideration (App. xv). Petitioner then sought a writ of certiorari from the Georgia Supreme Court (App. xxvi, xxvii), which was denied. (App. xvi, xvii).

REASONS FOR ALLOWANCE OF THE WRIT

Petitioner respectfully shows that there are two reasons why the Writ of Certiorari should be granted in this case:

1. In South Dakota v. Neville,[1] this Court recognized the important federal question of whether admission into evidence of a defendant's refusal to submit to a blood-alcohol test violated his privilege against self-incrimination.[2] This opinion expressly reserved possible distinctions for other circumstances.[3]

The case presented here is a classic distinction. Petitioner was not given any Miranda warnings prior to being asked to submit to the test, in contrast to Neville, where the defendant was properly read his Miranda rights.[4]

Therefore, the Georgia Court of Appeals has decided this important

ancillary question which has not, but should be, settled by this Court.

2. Another critical distinction from Neville is that Petitioner's "refusal" which was admitted into evidence amounted to silence when asked repeatedly if he would take a breath test. In Wainwright v. Greenfield,[5] this Court clearly held that a defendant's post-arrest silence was protected by the Fifth and Fourteenth Amendments, and its admission into evidence, even after Miranda warnings, violated due process.[6]

On this issue, the Georgia Court of Appeals has decided this critical federal question in a way that conflicts with applicable decisions of this Court.[7]

Footnotes

1. 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983)

2. U.S. Constitution, Amend. V, XIV

3. 459 U.S. at 562; 103 S.Ct. at 922

4. 459 U.S. at 555, n. 1; 103 S.Ct. at 918, n. 1

5. 474 U.S. 284, 106 S.Ct. 634, 88 L.Ed.2d 623 (1986)

6. Id.

7. Id.; Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)

WHEREFORE, Petitioner prays that this Court grant a writ of certiorari to the Court of Appeals of Georgia, in order to review the judgment in this case.

Respectfully submitted,

/s/

ROBERT W. CHESTNEY
Counsel for Petitioner

6325 Amherst Court
Suite 300
Norcross, Georgia 30092
404/263-0015

/s/

GREGORY E. STUHLER
Of Counsel

6325 Amherst Court
Suite 300
Norcross, Georgia 30092
404/263-0015

APPENDIX

COURT OF APPEALS OF GEORGIA

ATLANTA, MAY 13, 1992

CASE NO. A92A0350

LANKFORD v. THE STATE

JOHNSON, Judge. JO-016C.

George W. Lankford was convicted of failure to maintain lane, following too closely, violating the duty of a driver to stop at the scene of an accident, driving under the influence of alcohol, no proof of insurance and driving without a license on his person. Lankford appeals from his conviction and the denial of his motion for a new trial.

1. Lankford contends the trial court erred in allowing evidence that he refused to take a breath test. It is uncontroverted that the arresting officer read to Lankford his implied consent

rights under OCGA § 40-5-55 before asking Lankford to submit to the breath test. Lankford argues, however, that evidence of his refusal to take the test should have been excluded because the officer did not advise him of his rights under Miranda v. Arizona, 384 U.S. 436 (86 SC 1602, 16 LE2d 694) (1966). This argument is without merit.

"In any criminal trial, the refusal of the defendant to permit chemical analysis to be made of his blood, breath, urine, or other bodily substance at the time of his arrest shall be admissible in evidence against him." OCGA § 40-6-392 (d). "A refusal to take a blood alcohol test which was requested by a police officer is not an act coerced by the officer, and the refusal is not protected by the privilege against self-

incrimination." Patton v. State, 170 Ga. App. 807 (2) (318 SE2d 231) (1984), citing Wessels v. State. 170 Ga. App. 246 (312 SE2d 361) (1983). Lankford's refusal to take the test is not protected by the privilege against self-incrimination. Accordingly, the court was not required to exclude evidence of Lankford's refusal due to the officer's failure to inform Lankford of his Miranda rights. We find no error.

2. Lankford enumerates as error the trial court's denial of his motion to suppress evidence of his field sobriety test. The arresting officer was allowed to testify that at the scene of the traffic stop Lankford was not able to recite the entire alphabet or adequately perform physical dexterity tests. Lankford was not informed of his Miranda

rights prior to the test. Consequently, Lankford claims, the officer's testimony violated his right against self-incrimination as protected by the fifth amendment of the United States Constitution, by Art.1, §1, Par.16 of the Georgia Constitution and by OCGA § 24-9-20. This enumeration is without merit.

"[W]e hold that the alphabet test and the physical dexterity tests are not inadmissible under the fifth amendment of the U.S. Constitution because they were not evidence of a testimonial or communicative nature." Hughes v. State, 259 Ga. 227, 228 (2) (b) (378 SE2d 853) (1989). Consequently, the officer's testimony regarding the field sobriety test was admissible and did not violate Lankford's rights under the fifth amendment.

Moreover, we find that there was no violation of Lankford's right not to incriminate himself under the fifth amendment, the Georgia Constitution, or OCGA § 24-9-20, because he was not in custody at the time the field sobriety test was administered. "A law enforcement officer coming upon the scene of suspected criminal activity will conduct a general on-the-scene investigation and may detain temporarily anyone at the scene who tries to leave before the preliminary investigation is completed. Such detentions do not trigger the requirements of Miranda v. Arizona." (Punctuation and citations omitted.) Daugherty v. State, 182 Ga. App. 730, 731 (356 SE2d 902) (1987). Here, the evidence shows that an off-duty police officer observed Lankford commit several traffic offenses. The

officer stopped Lankford and noticed that he appeared to be intoxicated. The officer waited with Lankford for approximately three minutes before two other officers arrived to conduct an investigation. The off-duty officer then left the scene. One of the backup officers conducted the field sobriety test before placing Lankford under arrest. "The evidence authorized the conclusion that defendant had not yet been arrested at the time of his [field sobriety test] but was being briefly detained while the officer determined the nature of the situation." Daugherty v. State, supra. "'Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.'" [Cits.] Lipscomb v. State, 188 Ga. App. 322 (372 SE2d 853) (1988). Since Lankford was out formally

arrested until after the field sobriety test, there was no violation of his right against self-incrimination. The trial court therefore did not err in denying Lankford's motion to suppress.

3. Lankford complains that the trial court erred in failing to direct a verdict of acquittal as to the offenses of failure to maintain lane, no proof of insurance, and driving without a license on his person. Lankford argues that there was insufficient evidence to prove the essential elements of each offense. We disagree.

Lankford made a motion for a directed verdict of acquittal only as to the offense of failure to maintain lane. He made no such motion as to the offenses of no proof of insurance and driving without a license on his person, although he did

challenge the sufficiency of the evidence on those two offenses in his motion for a new trial. On appeal, the standard established in Jackson v. Virginia, 443 U.S. 307 (99 SC 2781, 61 LE2d 560) (1979), "is the proper test [to be used] when the sufficiency of the evidence is challenged, whether the challenge arises from the overruling of a motion for directed verdict or the overruling of a motion for a new trial based upon alleged insufficiency of the evidence." Humphrey v. State, 252 Ga. 525, 527 (1) (314 SE2d 436) (1984). One police officer testified that he stopped Lankford after seeing him swerve out of his lane three times, run into the back of another car, and leave the scene of the collision without stopping. Another officer testified that Lankford failed to produce his driver's

license and proof of insurance upon request. He also testified that neither of those items was found in Lankford's car during a routine inventory search of the vehicle. Reviewing all of the evidence in the light most favorable to the jury's determination, we conclude that a rational trier of fact could have found Lankford guilty of failure to maintain lane, no proof of insurance, and driving without a license on his person. Jackson v. Virginia, supra.

4. Lankford challenges the sufficiency of the accusation charging him with violating the duty of a driver to stop at the scene of an accident. He claims that the accusation fails to set forth all elements of the offense. This argument was not properly raised in the

trial court and may not be raised for the first time on appeal.

"Rule 31.1 of the Uniform Superior Court Rules does require all motions and demurrers to be made and filed at or before the time of arraignment unless the time is extended in writing by the judge. In addition, OCGA § 17-7-111 requires such motions to be made in writing. These rules, however, do not preclude an oral objection to the sufficiency of an indictment or accusation at any time during the trial if it is so defective that judgment upon it would be arrested. Where the accused desires to take exception to the form of an indictment or accusation, it is essential that he should do so by a demurrer or motion to quash, made in writing and before pleading to the merits." (Punctuation and citations

omitted.) Pullen v. State, 199 Ga. App. 881 (406 SE2d 283) (1991). In the case at bar, Lankford made no written demurrer or motion to quash the accusation and he made no oral objection to its sufficiency at trial. Accordingly, Lankford waived any objection to the form or sufficiency of the accusation and he may not now raise it on appeal.

5. Lankford contends the trial court erred in admitting evidence of similar transactions. The contention lacks merit.

"Evidence of similar crimes (or transactions) is admissible where its relevance to show identity, motive, plan, scheme, bent of mind and course of conduct, outweighs its prejudicial impact. However, before it is admissible, two conditions must be satisfied. First,

there must be evidence that the defendant was in fact the perpetrator of the independent crime (or transaction). Second, there must be sufficient similarity or connection between the independent crime (or transaction) and the offense charged." (Punctuation and citations omitted.) Gulley v. State, 197 Ga. App. 131, 132 (2) (397 SE2d 609) (1990). In the case at bar, the trial court admitted evidence of three similar transactions. All three of the similar crimes and the offense charged involved Lankford driving a motor vehicle under the influence of alcohol and causing a collision. The offense charged and two of the similar transactions occurred in the same county, while the third similar offense occurred in an adjoining county. Further,

all four incidents occurred in the evening and, in all but one of the incidents, Lankford was driving the same car. We find sufficient similarity between the three similar transactions and the offense charged. The trial court did not abuse it s discretion in admitting the similar transaction evidence. See Blane v. State, 195 Ga. App. 504 (1) (393 SE2d 759) (1990).

6. Lankford next enumerates as error the trial court's refusal to give his requested jury charge on accident. "'A request to charge must be legal, apt, and precisely adjusted to some principle involved in the case, and be authorized by the evidence.'" [Cit.] Grant v. State, 197 Ga. App. 878, 880 (2) (299 SE2d 743) (1990). A charge on accident was not authorized by the issues or evidence in

this case. Accordingly, the court did not err in refusing Lankford's requested charge.

Judgment affirmed. Pope, J., concurs, and Carley, P. J., concurs in Divisions 1, 2, 3, 4, and in the judgment.

COURT OF APPEALS OF GEORGIA

ATLANTA, JUNE 2, 1992

CASE NO. A92A0350

GEORGE W. LANKFORD v. THE STATE

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF GEORGIA

ATLANTA, GEORGIA, JULY 16, 1992

CASE NO. 592C1162

GEORGE W. LANKFORD v. THE STATE

COURT OF APPEALS CASE NO. A92A0350

The Supreme Court today denied the petition for certiorari in this case.

All the justices concur.

SUPREME COURT OF GEORGIA

ATLANTA, GEORGIA, JULY 30, 1992

CASE NO. 592C1162

GEORGE W. LANKFORD v. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

"9.

Defendant further requests that the failure to take the breath test be suppressed as Defendant had already been arrested at the time he was asked to take said test and the request was merely an attempt to gather evidence against him, without first advising him of his 'Miranda' rights."

Defendant's Brief in Support of Motion to Suppress
September 24, 1990

"The defendant's refusal to take the State Administered Intoximeter test shall be admitted into evidence since Officer Hawkins read the Implied Consent warning to defendant after his arrest for DUI. O.C.G.A. Section 4-6-392(c).

"Accordingly, Defendant's Motion to Suppress evidence, statements, and his refusal to submit to the intoximeter test is hereby denied.

"SO ORDERED this 10th day of July, 1989.

/s/
MICHAEL STODDARD, Chief Judge
State Court of Cobb County"

Order Denying Motion to Suppress
July 10, 1989

"George W. Lankford shows that he was denied due process under the Fifth and Fourteenth Amendments to the Constitution of the United States and the Constitution of the State of Georgia, that the State failed to prove the necessary elements of certain charges, that the 'Duty of Driver' conviction is a legal nullity, that the State failed to give required 'Miranda' warnings, and that the field sobriety tests administered by the State are in violation of O.C.G.A. 24-9-20."

Brief in Support of Defendant's Motion for New Trial
June 28, 1991

"Defendant claims that allowing the Defendant's refusal of the chemical blood test into evidence was error, insisting that the Georgia Supreme Court decision of Hughes v. State, 259 Ga. 227 (1989), compels a finding that the Court's failure to grant Defendant's Motion in Limine/ Motion to Suppress is reversible error. However, the Court disagrees inasmuch as Defendant's refusal to take a breath test came after his arrest and after he was advised of his Georgia Implied Consent Warning. Such a refusal to take a state-administered chemical test for alcohol is not protected by the privilege against self-incrimination, O.C.G.A. Section 24-9-20, and therefore, Miranda warnings were not necessary. South Dakota v. Neville, 459 U.S. 553 (1983); Wessels v. State, 169 Ga. App. 246 (1983); Patton v. State, 170

Ga. App. 807 (1984); O.C.G.A. Section 40-6-392 (c)."

Order denying Motion for New Trial
August 8, 1991

"1. The trial court erred in denying Appellant's Motion In Limine and Motion to Suppress any reference to Appellant's refusal to take a chemical breath test as Appellant had been placed under arrest by the Detective Reid (the eye-witness who had been following Appellant at the time of the alleged incidents) for 'Failure to Maintain Lane', 'Following too Closely' and 'Duty of Driver' charges, at the time of the initial stop, and he was subsequently also placed under arrest by Officer Hawkins (the officer who was called to the scene) for D.U.I., following the administration of field sobriety tests, but preceding the request to submit to the chemical breath test, with no 'Miranda' warnings being given at any time.

"2. The trial court erred in denying Appellant's Motion In Limine and Motion to Suppress any reference to the field sobriety tests required by Officer Hawkins as Appellant had already been placed under arrest at that time by Detective Reid for the charges outline[d] in enumeration number two, which Detective Reid witnessed, and Appellant could not be compelled to give evidence against himself pursuant to O.C.G.A. § 24-9-20."

Appellant's Brief in His Appeal to the Court of Appeals
November 25, 1991

"MR. LANKFORD WAS PLACED UNDER ARREST PRIOR TO BEING ASKED TO TAKE A CHEMICAL BREATH TEST AND NO 'MIRANDA' WARNINGS WERE GIVEN. MR. LANKFORD'S ALLEGED REFUSAL TO TAKE A CHEMICAL BREATH TEST SHOULD THEREFORE HAVE BEEN SUPPRESSED AS REQUESTED."

Appellant's Brief in Support of Motion for Rehearing in the Court of Appeals
May 22, 1992

"I. Mr. Lankford was placed under arrest prior to being asked to take a chemical breath test and no 'Miranda' warnings were given. Mr. Lankford's alleged refusal to take a chemical breath test should therefore have been suppressed as requested."

Appellant's Application for Writ of Certiorari to the Georgia Supreme Court
June 22, 1992

"MR. LANKFORD WAS PLACED UNDER ARREST PRIOR TO BEING ASKED TO TAKE A CHEMICAL BREATH TEST AND NO 'MIRANDA' WARNINGS WERE GIVEN. MR. LANKFORD'S ALLEGED REFUSAL TO TAKE A CHEMICAL BREATH TEST SHOULD THEREFORE HAVE BEEN SUPPRESSED AS REQUESTED."

Petitioner's Motion for
Reconsideration in the
Georgia Supreme Court
July 27, 1992